

Opinion No. 70-42

April 22, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mrs. K. Rose Wood Director Commission on Aging 408 Galisteo Santa Fe, New Mexico 87501

QUESTIONS

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May moneys distributed to the counties and municipalities for recreational purposes be deposited or transferred to any other fund than the "county and municipality recreational fund"?

CONCLUSION

No.

OPINION

{*73} ANALYSIS

Section 72-14-14.1, N.M.S.A., 1953 Compilation (1969 P.S.) is set out:

County and municipality recreational fund -- Distribution. -- A. There is created in the state treasury a fund to be known as the "county and municipality recreational fund." At the end of each month the state treasurer shall distribute all sums remaining in the county and municipality recreational fund to each county and municipality in the state as follows:

(1) to each county in the proportion that the sales of cigarettes made within the county borders, exclusive of sales within any municipality in that county, bears to the total sales of cigarettes in the state during such month; and

(2) to each municipality in the proportion that the sales of cigarettes made within the municipality during such month bears to the total sales of cigarettes in the state for such month.

B. The funds distributed to the counties and municipalities under this section shall be used for recreational facilities and salaries of instructors and other employees necessary to the operation of such facilities. Such recreational facilities shall be for the use of all persons, and juveniles and elderly persons shall not be excluded. Each county or municipality shall establish a fund to be known as the "recreational fund" into which

all moneys received from the county and municipality recreational fund shall be deposited. As used in this section, "juvenile" means every person under the age of twenty-one [21] years and "elderly person" means every person over the age of sixty [60] years.

The mandate of this statute is clear, in that monies from the state "county and municipality recreation fund" must go into the "recreational fund" of the county or municipality.

Possible confusion may have arisen under a similar statute, Section 72-14-14.2, N.M.S.A., 1953 Compilation {*74} (1969 P.S.), which is set out, as follows:

County and municipal cigarette tax fund -- Distribution. A. There is created in the state treasury a fund to be known as the "county and municipal cigarette tax fund." At the end of each month the state treasurer shall distribute all sums remaining in the county and municipal cigarette tax fund to each county and municipality in the state as follows:

(1) to each county in the proportion that the sales of cigarettes made within the county borders, exclusive of the sales within any municipality in that county, bears to the total sales of cigarettes in the state during such month; and

(2) to each municipality in the proportion that the sales of cigarettes made within the municipality during such month bears to the total sales of cigarettes in the state for such month.

B. The funds so distributed to the counties and municipalities under this section shall be deposited in the general fund of such counties and municipalities; Provided, the cigarette tax revenues distributed under the provision of this section shall not be earmarked or otherwise obligated under the terms or provisions of any prior law, prior local ordinance or prior bond agreement which pledges cigarette tax revenues to the payment of any principal or interest of revenue bonds issued pursuant to such prior law, prior local ordinance or prior bond agreement.

The distinction between these two statutes is that 72-14-14.1, supra, directs that funds from the state "county and municipality recreational fund" must go to the county or municipal "recreational fund", while 72-14-14.2, supra, directs that funds from the "county and municipal cigarette tax fund" go to the general fund of the county or municipality.

The source of these two separate funds is provided for in Section 72-14-14, N.M.S.A., 1953 Compilation (1969 P.S.) as revised in the 1969 legislative session and is herein in pertinent part set out:

Tax distribution. -- A. Receipts from the tax on cigarettes shall be distributed as follows:

(1) to be deposited in the county and municipality recreational fund, receipts equivalent to one-half cent (\$.005) on each package of ten [10] cigarettes or less; one cent (\$.01) on each package containing more than ten [10] and not more than twenty [20] cigarettes; and one-half cent (\$.005) on each additional ten [10] cigarettes or less over twenty [20] cigarettes contained in any one package;

* * *

(3) to be deposited in the county and municipal cigarette tax fund, receipts equivalent to one cent (\$.01) on each package of ten [10] cigarettes or less; two cents (\$.02) on each package containing more than ten [10] and not more than twenty [20] cigarettes; and one cent (\$.01) on each additional ten [10] cigarettes or less over twenty [20] cigarettes contained in any one [1] package; and

* * *

Under the old section, funds held in the state, county and municipality recreational cigarette tax fund could not be transferred to other county or municipal funds. See Opinions of the Attorney General Nos. 59-81, dated July 28, 1959; 59-121, dated August 26, 1959; and 61-20, dated February 23, 1961.

It is our opinion that the revised section contains no authority to now allow such transfers in view of Section 6-4-10, 1953 Compilation (P.S.), which adds support to the conclusion that the funds are still earmarked.

By: Frank N. Chavez

Assistant Attorney General